IN THE

Supreme Court of the United States

OCTOBER TERM, 1940
No. 553

JOSEPH C. LENIHAN and JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,
and
CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD and WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

PETITIONER'S REPLY BRIEF IN RESPONSE TO THE SEVERAL BRIEFS OF THE RESPONDENTS OPPOSING THE PETITION FOR A WRIT OF CERTIORARI.

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Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

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AUTHORITIES CITED.

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This Reply Brief is respectfully submitted in response to the several Briefs of the Respondents in opposition to the Petition, served and filed herein.

The petitioners shall not be deemed by this Reply Brief to relinquish any position asserted in their Petition and Supporting Brief filed with the Record herein, November 6, 1940.

The Federal Question Presented and Determined Adversely to the Claims of the Petitioners, in This Cause, Was Broad Enough to Cover the Entire Case and Its Decision Controlled the Determination of This Cause by the State Supreme Court.

The Record embracing the pleadings, orders, memoranda and Judgment of the District Court and the proceedings in the State Supreme Court, in this cause, demonstrates that the petitioners therein seasonably presented a Federal question of substance for decision to the Highest Court of the State having jurisdiction, that the decision of said Federal question was necessary to the determination of this cause, that said Federal question was actually decided by the State Supreme Court, in this cause, adversely to the claims of the petitioners, that the Final Judgment of the State Supreme Court, as rendered in this cause, could not have been given without deciding said Federal question, and that special and important reasons exist for the issuance of the writ sought, and the review and reversal of the Final Judgment of the State Supreme Court in this cause. (Rec. pp. 1 to 35 incl., 78 to 120 incl., pleadings, 38 to 44 incl., 51 to 77 incl., 129 to 141 incl., Dist. Ct. Mem.) (Rec. Proc. St. Sup. Ct. pp. 1 to 22 incl.)

New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 67, 69, 73 L. Ed. 184, 187, 188, 49 S. Ct. 61, 62 A. L. R. 785.

Chesebro v. Los Angeles County Flood Control Dist. et al., 306 U. S. 459, 83 L. Ed. 921, 925.

The Federal question thus presented and determined adversely to the claims of the petitioners was broad enough

to cover the entire case and its decision controlled the determination of this cause by the State Supreme Court.

The petitioners by their complaint, in the District Court, seeking the adjudication of the assailed order as void and unenforceable and a permanent injunction restraining its enforcement, as respects the City of St. Paul Metropolitan Area, alleged as the basis for such relief, that the assailed order was made without notice, hearing, evidence, essential findings of fact or a Record of the Commission's act in the premises upon which a judicial review of the said order might be afforded, and that by reason of such deficiencies the said order did not conform to the due process clause of the Federal constitution.

The District Court in its Memorandum (Rec. p. 61) made the following pertinent statement:

> "(c) The complaint alleges that the order was made without notice or a hearing or the receiving of evidence. The court is of the opinion that this allegation states a cause of action grounded upon a denial of the minimum constitutional requirements essential to due process and upon an absence of procedural steps mandatory under the statutes for a valid and binding order."

The Record of the proceedings in the State Supreme Court, in this cause, demonstrates that the decision of the State Supreme Court was based upon the determination of said Federal question.

> "The theory of the plaintiffs and the trial court as set forth in the learned memoranda of 28 pages accompanying the order overruling defendants' demurrers to the complaint and the order for judgment on the pleadings, is that the order of May 2, 1939, is void because there was no notice of hearing, no testimony

taken, and no findings of fact contained therein sufficient in law to sustain it."

* * * "But it appears to us that regardless of the fact that the order of May 2, 1939, was made without notice of hearing, without the taking of testimony and the claimed deficiency as to findings, it is nevertheless valid." (Rec. Proc. St. Sup. Ct. P. 12, f. 3; p. 16, f. 3.)

The State Supreme Court in its decision also said:

"Plaintiffs contend that sec. 5298 of the code requires the commission to 'give all interested parties a chance to furnish evidence and be heard.' But that is when the commission deems it needful to have a valuation of all the property invested in the utility, as was done prior to the order of March 31, 1936. And, of course, then sec. 5307 applies." (Rec. Proc. St. Sup. Ct. pp. 17, 18.)

The State Supreme Court in its decision further said:

"In the case where a telephone company presents a proposal to increase or decrease or change its rates, it, of course, consents thereto, so that it cannot thereafter raise any claim that the rate is confiscatory. The commission in determining whether the proposed new schedule of rates is just and reasonable need not necessarily have a valuation of the company's property and a tedious and expensive litigation. It may already have knowledge of the situation. No statute is pointed to which prescribes that there must be notice given of hearings and testimony taken if the commission has all the necessary information for determination whether the rates proposed to supersede those in force are just and reasonable." (Rec. proc. St. Sup. Ct. pp. 12, 13.)

The Federal Question, Presented and Decided, in This Cause, Is One of Substance, the Decision and Final Judgment of the State Supreme Court Are Not in Accord With the Applicable Decisions of the Supreme Court of the United States and There Exist Special and Important Reasons for the Issuance of the Writ.

The Federal question thus presented by the petitioners and so determined by the State Supreme Court in this cause is manifestly a Federal question of substance.

This Honorable Court has consistently construed and applied the due process provisions of the Fourteenth Amendment to the Federal Constitution so as to require notice, hearing, evidence, findings of fact and a record capable of judicial review, as jurisdictional prerequisites to the order of a State rate making Commission prescribing and promulgating public utility rates.

Ohio Bell Teleph. v. Public Utilities Com., 81 L. Ed. 1093, 1100, 1101; 301 U. S. 292, 303;

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393;

Interstate Commerce Com. v. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434; 227 U. S. 88, 91;

St. Joseph Stock Yards Co. v. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73;

Morgan v. United States, 80 L. Ed. 1288, 1294, 1295;

Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas, et al., 67 L. Ed. 124, 130; 260 U. S. 48, 59, 43 S. Ct. 51;

Panama Refining Co. v. Ryan, 293 U. S. 389, 430-431; 79 L. Ed. 446, 464, 465, 466.

The decision and the final judgment of the State Supreme Court, in this cause, are not in conformity with the applicable decisions of this Honorable Court.

The said Federal question, as presented, in this cause, is broad enough in scope, to challenge the assailed order as unconstitutional, under the Fourteenth Amendment to the Federal Constitution, and also to challenge as unconstitutional, under said Amendment, the delegation of the legislative power to prescribe rates, to the Commission, unqualified in its exercise by requirements for notice, hearing, evidence, essential findings of fact and a record permitting of judicial review, in the nature of jurisdictional prerequisite to its order prescribing and promulgating rates.

The Decision and Final Judgment of the State Supreme Court, in this cause, hold that the Commission is empowered to exercise the delegated legislative power to prescribe and promulgate rates, for telephone service, unrestricted by requirements for notice, hearings, evidence, findings of fact and the compilation of a record permitting of judicial review and to enter its order altering and increasing rates, conditional only upon the assent of the public utility to be thereby regulated. The authority thus purported to be conferred upon the Commission, is inconsistent with rational justice and comes under the Federal Constitution's condemnation of all arbitrary exercise of power. The effect of the said Decision and Final Judgment would be the conferring upon the Commission a power possessed by no other administrative body, officer or tribunal, under our Government, State or Federal.

There are, palpably, special and important reasons for the issuance of the Writ sought herein.

City Commission v. Bismark Water Supply Co., 181 N. W. 596, 597, 600.

Interstate Commerce Commission v. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434.

Wichita Railroad & Light Co. v. Public Utilities Commission of The State of Kansas and Kansas Gas & Electric Company, Intervener, reported in 67 L. Ed. 124, 130.

Petition for Re-argument Manifestly Would Have Been Unavailing.

The said federal question was fully presented by the Record, in the Briefs and upon Oral Argument in the State Supreme Court, in this cause. It is manifest also from the tenor of the Decision and in view of the unanimity of opinion of the participating justices that a petition for reargument would have been unavailing. The fact that such a petition would be unavailing, because of such circumstances and conditions, was alleged in the petition of these petitioners for the order of the State Supreme Court, in this cause, staying all proceedings except the entry of the Final Judgment. The State Supreme Court considered said petition and by the entry of the Order thereupon, impliedly acquiesced in the allegations that a petition for rehearing would be unavailing (Rec. Proc. St. Sup. Ct. 2, pp. 24 to 28 inclu.).

The Brief of the Respondent Company Contains Inacurate Statements Calculated to Mislead this Honorable Court.

The Respondent, The Tri-State Telephone and Telegraph Company, has set forth untrue and misleading statements in its said brief. The said Respondent on page 3 of said Brief sets forth the following statement:

> "The intervenor City of Saint Paul knew of the issuance of the order here in litigation or agreed thereto and accepted the benefits thereof."

This quoted statement manifestly is unsupported by the Record and is in its entirety untrue and calculated to mislead this Honorable Court.

The said Respondent in the second paragraph on page 15 of its Brief sets forth the following statement:

> "The intervenor, City of Saint Paul, acquiesced in this settlement and signed the stipulation for dismissal of the formal litigation, which stipulation recited the issuance of the May 2, 1939, order as being pursuant to the stipulation"

This statement manifestly is unsupported by the Record in any respect, and is entirely untrue.

The stipulation referred to in the quoted statements, contained in said Respondent's Brief, is set forth on pages 84 to 86 inclusive of the Record.

The order, here assailed, emanated from a secret or cloistered conference of the Commission, the Attorney General of the State of Minnesota, the Northwestern Bell Telephone Company and the Respondent, The Tri-State Telephone and Telegraph Company, to the exclusion of the City

of Saint Paul. The City of St. Paul had no notice of the negotiations between said Commission, said Attorney General and said Companies, nor did it participate in any respect in the agreement recited as one of the bases for said order. The agreement between the Commission, the Attorney General and said companies and the entry of the assailed order on May 2, 1939, were accomplished facts long prior to the signing of said stipulation.

The City of Saint Paul was an intervenor in the litigated rate case involving the Commission's order of March 31, 1936, and as such was requested to sign the stipulation. The stipulation related to the litigated rate case, then pending upon stay of proceedings operating until June 5, 1940, in the State Supreme Court, after said Supreme Court's decision dated February 24, 1939, affirming the judgment of the District Court which adjudicated the said order of March 31, 1936, valid, reasonable and not confiscatory. The stipulation was prepared and presented by the Attorney General of the State of Minnesota and had for its operating clause the stipulation of the parties to said cause that upon the expiration of the stay entered therein final judgment might be entered pursuant to the opinion of the court and its mandate issued to the District Court.

The stipulation was so presented approximately two weeks after the entry of the assailed order without any copy of said order or any communication pertinent to the proceedings which attended its entry.

The attention of the court is directed to the Stipulation to Vacate Stay, in said last mentioned cause, executed by the Attorney General of the State of Minnesota and the Attorneys for the Tri-State Telephone and Telegraph Com-

pany and to which neither the City of Saint Paul nor the City of South St. Paul was a party. The final judgment of the Supreme Court in said last mentioned cause was entered not pursuant to the stipulation signed by the City of Saint Paul which contemplated the entry of judgment at the expiration of the existing stay, on June 6, 1939, but upon the later stipulation signed only by the Attorney General of the State of Minnesota and the Attorneys for The Tri-State Telephone and Telegraph Company (Rec. pp. 87, 88; p. 80).

The Respondents in the District Court, in this cause, sought to preclude the City of Saint Paul as intervenor from uniting with the petitioners-plaintiffs in the motion for judgment on the pleadings, upon the basis of the stipulation which had been signed as aforesaid by the counsel for the City of Saint Paul. The court considered the stipulation and the arguments thereon and overruled the objection thus presented by the Attorney General. The State Supreme Court in this cause held that the City of Saint Paul did not participate in the agreement which resulted in the promulgated order of May 2, 1939 (Rec Proc. Sup. Ct. page 18 FF. 1 and 2). The Court said:

> "It does not appear that the City of St. Paul participated in the agreement which resulted in the promulgation of the order of May 2, 1939. But the Commission represented one side—the public and the users of the services—and the Company the other side in the rate fixing controversy * * * We do not think the City's non-participation in the settlement of the litigation vitiated the order made pursuant thereto: for as stated, its interests were represented by the commission and attorney general" (Rec. Proc. St. Sup. Ct. p. 18, ff. 2 and 3).

The State Supreme Court, in This Cause, Determined the Status of the Petitioners as Proper Parties Litigant in Their Respective Positions.

The Supreme Court, in this cause, held that the petitioners-plaintiffs are proper plaintiffs in this cause and that the petitioners-interveners City of Saint Paul is a proper party intervener in this cause. The Court in its decision made the following pertinent statements

The State Supreme Court, in its decision, said:

> "We assume for the purposes of this decision that the suit is properly brought by plaintiffs; that they have no adequate remedy at law and that the statutes do not provide an exclusive remedy."
>
> * * * "We do not overlook the fact that the City of St Paul and City of South St. Paul—users of the Company's services—were permitted to intervene in the original proceeding, and that the City of St. Paul is an intervener in the action." (Rec. Proc. St. Sup. Ct., p. 18, f. 1).

The City of St. Paul has no status in this cause distinguishable from that of any other subscriber to the services of the Tri-State Telephone and Telegraph Company, resident in the City of Saint Paul Metropolitan area detrimentally affected by the assailed order. The City of Saint Paul appears herein merely as such subscriber and not in its capacity as a municipal corporation or in any respect in any governmental capacity. The citations set forth on page 8 of the Brief of the Respondent company as the basis for its assertion therein made that the City may not be heard here claiming lack of due process are not pertitnent to the situation at hand.

D. Hunter, Jr. et al., v. City of Pittsburgh, 52 L. Ed. 151, pp. 159 and 160, 207 U. S. 161, 179, 180.

The authorities cited in the Respondent Briefs from our examination of the same, necessarily limited because of lack of time, do not appear to support in any instance, the claims apparently made on behalf of the Respondents and no good purpose could now be served in an attempt to further discuss the same.

Respectfully submitted,

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